No. 75-1165

Supreme Court, U. S.
FILED
APR 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
LLOYD JOHN OSBORN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ARTHUR J. CERRA,
General Counsel,

CHARLES H. WHITE, JR.,
Associate General Counsel,

KENNETH G. CAPLAN,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1165

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

In 1958 the Canadian Pacific Railroad acquired a 51 percent interest in Smithsons Holdings Ltd., a Canadian motor carrier holding both Canadian and American operating rights. Smithsons Holdings, through its subsidiary Smith Transport (Canada) Ltd., had, shortly before, transferred its United States authority to Smith Transport (U.S.) Ltd. An international single-line service thus became two separate services, with interchanges at the international border. In 1960 Canadian Pacific acquired the remaining 49 percent of the stock of Smithsons Holdings, including complete control of Smith Transport (Canada) (J.S. App. 22a-24a).

In 1968 Smithsons Holdings acquired the outstanding stock of Smith Transport (U.S.), an acquisition that placed Canadian Pacific in control of an American truck service. Canadian Pacific asked the Commission to approve this acquisition, pursuant to Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5.[1] After full administrative proceedings,[2] Division 3 of the Commission approved the acquisition (J.S. App. 12a-14a), adopting in substance the findings and conclusions of the administrative law judge (J.S. App. 17a-54a). The Commission concluded that the acquisition by its trucking subsidiary of the American trucking operations would enable the railroad to fulfill its continuing responsibility to handle less-than-carload traffic from Canada to the United States. The Commission found that special circumstances supported this unrestricted acquisition because no similar service is available in areas served by Smith Transport (U.S.).

Appellant brought suit, contending that the Commission could not approve the acquisition without restricting the operations of Smith Transport (U.S.) to those "auxiliary to and supplemental of" Canadian Pacific's railroad operations. The three-judge district court unanimously sustained the Commission's decision (J.S.

---

[1]Canadian Pacific is subject to the Commission's jurisdiction because it operates a few miles of track in northern Vermont and Maine and controls the Soo Line in northern Michigan (J.S. App. 25a-26a).

[2]The original application was accompanied by a motion to dismiss all Section 5 proceedings on the ground that the transaction was not subject to Commission jurisdiction because actual control of Smith Transport (U.S.) had been vested in an independent trustee. The Commission rejected that contention (J.S. App. 20a). The trust now has been dissolved and all stock of Smith Transport (U.S.) is held by Smithsons Holdings (J.S. App. 4a).

App. 1a-10a). The court observed that the Commission frequently has waived such restrictions in acquisition and certification proceedings upon a showing of "special circumstances" (*id.* at 6a-7a). While recognizing that it was the first court to pass upon the propriety of such a waiver in an acquisition proceeding, the court held that this case is controlled by this Court's approval of the identical practice in other Commission cases involving railroad control of trucking operations. It also deferred to the "construction given to a statute by the administrative agency whose duty it is to carry out its provisions", which "is entitled to great weight and should not be overruled unless clearly wrong" (*id.* at 7a-8a). Finally, the district court concluded that "[t]he finding by Division 3 of 'special circumstances' warranting approval of the instant acquisition without restrictions is clearly supported by substantial evidence" (*id.* at 9a).

ARGUMENT

The district court's decision is supported by principles that have long been accepted by this Court. It extends those principles to another method by which railroads come to engage in motor transport service. This difference in form, however, does not call for a difference in result. The same rules that govern railroad entry into motor transportation should govern railroad acquisitions of existing firms. The Commission and the district court have recognized this. There is no occasion for plenary review by this Court.

1. As this Court noted in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 437: "The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers." The statute itself states simply that the Commission can approve a railroad's

acquisition of a motor carrier if the acquisition "will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition" (49 U.S.C. 5(2)(b)).

The Commission decided shortly after the enactment of the Motor Carrier Act of 1935 that it would often have to set conditions upon railroad operation of motor carriers in order to achieve the congressional "policy of opposition to railroad incursions into the field of motor carrier service." *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, 7. The Commission accordingly adopted a practice of restricting railroad-affiliated motor carriers to conducting operations that are "auxiliary to and supplemental of" the operations of the railroad. In *Rock Island, supra,* this Court approved the practice of imposing such "auxiliary and supplementary" restrictions on railroad entry into the motor transportation industry.

But the Commission also concluded nearly 30 years ago that "auxiliary and supplementary" restrictions are neither necessary nor appropriate in every case. It frequently has approved Section 5 acquisition applications that do not contain such restrictions. See *Louisville, N. A. & C. R. Co. - Purchase - Meerman,* 45 M.C.C. 6; *Rock Island Motor Transit Co. - Purchase - White Line Motor Freight,* 40 M.C.C. 457, on further hearing, 55 M.C.C. 567; *Burlington Truck Lines, Inc. - Purchase - Pirnie,* 85 M.C.C. 363; *Canadian National Transportation Ltd. - Investigation of Control,* 109 M.C.C. 392.

American Trucking Associations, Inc. v. *United States,* 355 U.S. 141, held that the Commission acted within its discretion in waiving "auxiliary and supplementary" restrictions in a certificate issued to a railroad's

motor carrier subsidiary. Three years later, in *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, this Court decided that the Commission could not waive the customary restrictions in a certificate in the absence of special circumstances. Although both cases involved the issuance of certificates rather than the approval of acquisitions, there is no reason to apply a different rule to acquisitions. The Commission's practice of requiring "auxiliary and supplementary" restrictions in the absence of a showing of "special circumstances" rests on the general policy of the Motor Carrier Act rather than upon the specific language of Section 5(2)(b). The decision below is consistent with the language of the statute and the longstanding practice of the Commission. It does not conflict with the decision of any other court.[3]

The jurisdictional statement does not advance any reason, grounded in policy or in the statute, that would justify rules for acquisitions different from the rules applying to the issuance of new certificates. Appellant merely asserts that this Court should grant review because it has not considered this precise narrow question in the past. This is not a sufficient reason for plenary review.

2. Appellant also asserts (J.S. 16-21) that the Commission erred in concluding that the acquisition will enable Canadian Pacific "to use service by motor vehicle to public advantage in its operations" (Section 5(2)(b)).

---

[3]Although the Court's opinion in the first *American Trucking Associations* case contains dicta indicating that the Section 5(2)(b) proviso may impose some mandatory restrictions, the Court's subsequent decision in *American Trucking Associations, Inc.* v. *Frisco Co.,* 358 U.S. 133, 140, n. 5, observed that the question remains open.

Because of this, appellant argues, the acquisition should not have been approved even if the restrictions it insists upon are not required. This argument is essentially dependent upon the particular facts of this case and does not call for plenary review.

The Commission concluded that the statutory requirement is satisfied because Canadian Pacific can utilize Smith Transport (U.S.) to enable it to carry less-than-carload shipments to points in the United States. Appellant apparently believes that this rationale is deficient because the subsidiary's motor service does not run parallel to the parent's rail operations. But nothing in the language or the legislative history of Section 5(2)(b) supports such a reading of the term "public advantage." The Commission properly found that facilitation of less-than-carload service is to the "public advantage."

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
LLOYD JOHN OSBORN,
Attorneys.

ARTHUR J. CERRA,
General Counsel.

CHARLES H. WHITE, JR.,
Associate General Counsel.

KENNETH G. CAPLAN,
Attorney,
Interstate Commerce Commission.

APRIL 1976.

DOJ-1976-04